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In the Supreme Court of the United States

OCTOBER TERM, 1969

DONALD LESTER JAMES, IVAN ORRELS, DEWEY D'ANGELO, ALICE DIANNE WHITMIRE, JACK EDWARD KRESS, PETITIONERS

v.

UNITED STATES OF AMERICA

HARVEY HUTTON HUTCHINS, PETITIONER

v.

UNITED STATES OF AMERICA

RAYMOND LEROY ROLLING, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 416 F. 2d 467.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1969. The petition for a writ of certiorari in No. 746 was filed on October 16, 1969. Mr. Justice Black on October 13, 1969, extended the time for filing a petition for a writ of certiorari by Hutchins to November 16, 1969, and on November 14, 1969, his petition (No. 851) was filed. A petition for rehearing filed by Rolling was denied on October 31, 1969. The petition for a writ of certiorari by Rolling (No. 1341 Misc.) was filed on November 26, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand and petit jurors were properly selected.

2. Whether a search warrant was properly issued and executed.

3. Whether the evidence established a single conspiracy to use interstate facilities to promote an illegal gambling enterprise.

4. Whether the admission into evidence of statements of some of the petitioners requires a new trial under *Bruton* v. *United States,* 391 U.S. 123.

5. Whether the defense is entitled, without a showing of "particularized need," to the production of the grand jury testimony of government witnesses for use in cross-examination.

6. Whether the conduct of the prosecutor warranted a new trial.

7. Whether the instructions to the jury were proper.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Mississippi, all of the petitioners, except Orrels, were convicted of conspiracy to use certain facilities of commerce to promote an illegal gambling enterprise (18 U.S.C. 371 and 1952). All of the petitioners, except Rolling, were also convicted of a substantive violation of 18 U.S.C. 1952 and 2; petitioners James, Orrels, D'Angelo and Kress were convicted of transporting electromagnetic equipment from Oklahoma to Mississippi to promote the gambling enterprise; petitioner Hutchins was convicted of causing the mails to be used to collect checks received through the gambling enterprise; and petitioners Whitmire and D'Angelo were convicted of causing the mails to be used to collect other checks to promote the enterprise.[1]

The evidence is summarized in the opinion of the court of appeals (Pet. No. 746, pp. 42–46). In brief, it showed that petitioners James, D'Angelo and Rolling were involved with Harry Bennett, now deceased, in the operation of a gambling casino known as the Red Carpet Club in Harrison County, Mississippi. In March 1965, petitioners James and Orrels used a rented trailer to transport a number of heavy steel

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[1] James, Kress, Orrels, and D'Angelo were each sentenced to imprisonment for five years and were fined $10,000, $15,000, $5,000, and $3,000 respectively. As to James, Kress and D'Angelo, the court also suspended imposition of a sentence of imprisonment on one count. Whitmire, Hutchins and Rolling were each sentenced to imprisonment for three years. The court suspended 30 months of the sentences of Whitmire and Hutchins. (Tr. 2130–2151).

plates and wire coils from the business premises of petitioner Kress in Oklahoma to the gambling club (A. 1005–1012, 1032–1035), where Rolling assisted James and others in unloading the trailer (A. 349–355, 1378). With the assistance of petitioner Kress, who made the necessary electrical connections, the plates and coils were installed to make a device known as a "juice joint" which was used to control the roll of dice to cheat patrons of the club (A. 1076–1078, 1386–1389, 1391). In March 1965, petitioner Hutchins and Robert Bennett (the son of Harry Bennett) established a business known as the Check Cashing Service to cash the checks tendered by the club's patrons, and to correct the problem the club had experienced when customers stopped payment on checks on their return home (A. 1092–1095, 1302–1307). This service cashed checks until October 1965 (A. 1261–1263). In August 1965, after the Red Carpet Club had been closed by a local injunction, Harry Bennett, D'Angelo, and Rolling moved the equipment across the street and opened a gambling club known as Deano's Lounge (A. 336–339, 1098–1099). Kress again assisted them in making the "juice joint" operate properly (A. 1103–1104, 1429–1433). In October 1965, after D'Angelo bought out Harry Bennett's interest in Deano's (A. 1108), D'Angelo established a new procedure for collecting on checks by having petitioner Whitmire, who worked as a "shill" at both the Red Carpet Club and at Deano's, open a bank account under the fictitious name of "A. D. Marks" (A. 1255–1257, Tr. 1774–1778). The mails were used in the collection on the checks of patrons of the two gambling clubs through

both the Check Cashing Service and the "A. D. Marks" account. In November 1965, the sheriff of Harrison County removed the "juice joint" from Deano's Lounge (A. 474–476).

ARGUMENT

1. The grand jury in this case was selected prior to the enactment of the Jury Selection and Service Act of 1968 (82 Stat. 53). In placing the names of 2,700 prospective jurors in the jury wheel, the clerk of the district court deliberately included the names of women and Negroes in their respective percentages as shown by the last census (A. 53–66). His purpose was to obtain as close a cross-section of the population as possible and to comply with the decision in *Rabinowitz* v. *United States,* 366 F. 2d 34 (C.A. 5) (A. 64, 95–98). Thereafter, the names of 125 persons were selected at random to be jurors (A. 88–94). Petitioners' contention that the method used was illegal was properly rejected by the court below. The clerk could act affirmatively to insure that minority groups were represented by using a system that would probably result in a fair cross-section of the community. See *Brooks* v. *Beto,* 366 F. 2d 1 (C.A. 5), certiorari denied, 386 U.S. 975; *Rabinowitz* v. *United States, supra.*

2. On July 21, 1966, three search warrants were issued, authorizing the seizure from the home, manufacturing plant, and automobile of petitioner Kress in Tulsa, Oklahoma, of—

> gambling paraphernalia, including but not limited to dice, crap tables, wires, coils, solenoid

> switches, records, sales receipts, customers' lists, shipping orders, supplies, machine equipment, machine tools for the manufacture of gambling paraphernalia, including, but not limited to, dice, crap tables and cards which are now being used and have been used to engage in the manufacture and interstate transportation and sale of said articles in violation of Title 18, Sections 1952 and 1953, United States Code.

Among the items seized were dice, a dice table top, raw material for dice, cards, electrical equipment and machinery, machinery manuals, and records. In authorizing the seizure of "gambling paraphernalia" and "machine tools for the manufacture of gambling paraphernalia," the search warrants did not violate the requirement of specificity of the items to be seized. Where the object of a search is, as it was here, to seize property which cannot be exactly described, the property may be described in generic terms; otherwise such objects could never be seized. *Stanford* v. *Texas,* 379 U.S. 476, on which petitioners rely, is not to the contrary, since the invalid warrant there involved the seizure of literary material. This Court noted in *Marcus* v. *Search Warrant,* 367 U.S. 717, 731, where the warrants directed the seizure of obscene literature, that the—

> authority to the police officers under [such] warrants * * * poses problems not raised by * * * warrants to seize 'gambling implements' * * *.

The five-page affidavit signed by two FBI agents was sufficient to support the issuance of the warrants.

The affidavit showed, *inter alia*, that on April 17, 1965, at Casper, Wyoming, an FBI agent had searched a truck and an automobile which contained a crap table with concealed equipment to control magnetized dice and a box of magnetized dice with the return address of the Kress Manufacturing Company in Tulsa. The affidavit also stated that records of an electrical supply company showed sales of magnet wire to the Kress company for several years up to and including April 23, 1965; that on March 16, 1966, Kress had picked up electromagnetic coils from an electric company; and that on April 22, 1966, Kress told an FBI agent that his business included the manufacture of dice and cards. The affidavit stated further that on July 20, 1966, a Justice Department attorney informed the FBI that evidence had been developed by the federal grand jury at Jackson, Mississippi, that Kress—

> was then a manufacturer, seller and interstate transporter of crooked gambling equipment, and that in connection with his business, Jack Edward Kress would make frequent shipments and frequent trips in interstate commerce recently and now, in connection with the business of manufacturing crooked gambling equipment.[2]

The affidavit was based on events which were not too remote in time to establish probable cause to believe that petitioner Kress was violating federal law at

[2] The affidavit also referred to four attached newspaper articles in 1959 and 1961 which, *inter alia*, quoted Kress as declaring that he was then engaged in the production of crooked dice and other gambling equipment.

the time of the search. Apart from the statement from the Justice Department attorney, the affidavit showed that Kress was in the business of manufacturing crooked gambling equipment for a period of years extending at least to the date that he purchased magnet wire in March 1966. It was also clear that as late as April 1965 such equipment was being shipped in interstate commerce. In light of these facts, the Commissioner was justified in considering and crediting the statement, based on a current grand jury investigation, that the business was continuing and that Kress was still manufacturing and shipping crooked gambling equipment in commerce. *Jaben* v. *United States,* 381 U.S. 214, 224–225. Such equipment, by its very nature, would be used to promote illegal gambling enterprises. The Commissioner, therefore, could properly conclude that there was probable cause to issue the warrants.

3. The claim that there were multiple conspiracies instead of a single overall conspiracy was properly rejected by the court below. As the court held (Pet. No. 746, p. 51), "the evidence supports a finding that those present at the beginning as well as those remaining at the end, and those who participated in between, intended to establish a gambling enterprise and to promote that enterprise in a variety of ways through the use of facilities in interstate commerce." The fact that the enterprise moved across the street and changed its name, while continuing its operations with the same personnel and the same "juice joint," did not create discrete conspiracies. Since the plan to cheat patrons with the

juice joint depended upon the ability to collect on the checks before the patrons stopped payment when they realized that they had been cheated, the check cashing services were a necessary part of the overall scheme.

There was evidence that in March 1965 petitioner Hutchins went with Harry Bennett to pick up the concrete saw used to cut holes in the floor as part of the installation of the "juice joint". Even without that evidence, however, he knowingly joined the conspiracy when he suggested and participated in the check cashing service.[3]

Since there was a single conspiracy, the offenses were properly joined under Rule 8, F. R. Crim. P. There were no special facts which would render the joinder prejudicial under Rule 14.

4. Certain extra-judicial statements of co-conspirators were admitted into evidence under instructions limiting the jury's consideration of such statements to the declarants. Petitioners' contention that the admission of some of these statements was erroneous under *Bruton* v. *United States,* 391 U.S. 123, is an-

[3] The court instructed the jury that before it could find a defendant guilty of conspiracy it had to find that he and at least one other person knowingly entered into an unlawful agreement (1) to transport a "juice joint" in commerce and (2) to utilize commerce to cash checks for the purpose of promoting gambling (Tr. 2066–2068). That the jury understood these instructions is seen from its acquittal under the conspiracy count of petitioner Orrels, who hauled the trailer in commerce. This instruction, contrary to petitioners' contention, submitted the issue of multiple conspiracies to the jury by requiring an acquittal unless it found a single conspiracy.

swered by the opinion of the court of appeals, upon which we rely (Pet. No. 746, pp. 52–55). In addition to the harmless error principle on which the court relied (see *Harrington* v. *California*, 395 U.S. 250), it fairly can be said, in the circumstances of this case, that, as to these statements, "the jury can and will follow the trial judge's instructions" limiting their admissibility to the declarant. See *Bruton* v. *United States*, *supra*, 391 U.S. at 135.

5. The question whether the defense was entitled to the production of grand jury testimony for use in cross-examination of witnesses Robert Bennett and Maurice Arnold as a matter of right is also before this court on a petition for a writ of certiorari in *White* v. *United States*, No. 607 Misc., O.T. 1969, another case from the Fifth Circuit. As we pointed out in our brief in opposition in *White* (a copy of which we are furnishing to counsel for petitioners) this Court has not held that a defendant is excused from the obligation to make a particularized showing of need in order to obtain grand jury testimony of prosecution witnesses for impeachment purposes, see *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 400–401; *Dennis* v. *United States*, 384 U.S. 855, although the requirement has been eased in various circumstances by the Second, Tenth and District of Columbia Circuits. See *United States* v. *Youngblood*, 379 F. 2d 365 (C.A. 2); *Allen* v. *United States*, 390 F. 2d 476, 479–482 (C.A.D.C.); *Cargill* v. *United States*, 381 F. 2d 849, 850–853 (C.A. 10). In the instant case, as

the court below pointed out, the district judge made an *in camera* inspection of the material, and the defense had available extensive Jencks Act statements, which it used in cross-examination but did not urge as showing any need for the grand jury testimony. (See, *e.g.*, A. 1158–1159, 1163, 1202, 1505, 1555–1556). While Bennett and Arnold were important government witnesses, the significant parts of their testimony were corroborated. There was, for example, other evidence of both the interstate transportation of the juice joint to the gambling club (A. 349–355, 1005–1012, 1032–1035) and of the use of the check services to cash and collect gambling checks (*e.g.*, A. 179–188.)

6. Before Maurice Arnold appeared as a grand jury witness, he was told by three unknown men to claim the privilege against self-incrimination when he appeared as a witness (A. 1445–1446). He thereafter told the government attorney that he was afraid to have anyone discover that he had testified and asked for help to conceal the nature of his testimony (A. 1586). The government attorney thereafter advised him to tell anyone who inquired that he had claimed his privilege. This advice, under the circumstances, did not deprive petitioners of a fair trial. If counsel deemed further investigation desirable after Arnold testified, they could have requested extra time before commencing their cross-examination. As for the other claims of governmental misconduct, they are adequately answered in the opinion below (Pet. No. 746, pp. 58–59).

7. The contention that the trial court's instruction on reasonable doubt was erroneous is answered by the opinion of the court of appeals (Pet. No. 746, p. 55). None of the other numerous challenges to the instructions raises any issue warranting review by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petitions for writs of certiorari should be denied.

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